Filed 5/4/10 P. v. Sewell CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID SEWELL, Defendant and Appellant.	C060587 (Super. Ct. No. 08F04953)

A jury convicted defendant Michael David Sewell of threatening to commit a crime that would result in death or great bodily injury to D.D. (Pen. Code, § 422; count three; undesignated statutory references that follow are to the Penal Code) and misdemeanor battery of Lisa B. (§ 242).

The jury deadlocked on counts of assault with a deadly weapon (§ 245, subd. (a)(1)--counts one and two). The trial court declared a mistrial as to those counts and they were dismissed.

The trial court found that in 1983, defendant had been convicted of two counts of first degree burglary; and in 1987,

he had been convicted of first degree burglary, sexual penetration by a foreign object, rape, and sodomy. Defendant's request that the court dismiss his prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 was denied. The trial judge sentenced him to state prison on count three for 25 years to life (§§ 667, subds. (b)-(i), 1170.12), plus five years for a prior serious felony conviction (§ 667, subd. (a)) and one year for a prior prison term (§ 667.5, subd. (b)). On count four, he was sentenced to time served.

On appeal, defendant contends: (1) the trial court erred by conducting a sidebar conference within the earshot of D.D. that educated him as to the responses the prosecutor expected from him; (2) the court erred by failing to instruct the jury sua sponte on self-defense as a defense to the crime of making criminal threats; (3) in the alternative, his trial counsel's failure to request the instruction constituted ineffective assistance; and (4) there was insufficient evidence that two of his three prior burglary convictions were first degree rather than second degree. We affirm the judgment.

FACTS AND PROCEEDINGS

On the evening of June 18, 2008, defendant was living with his sister Lisa B. and her three sons, 18-year-old J.J., 15-year-old D.D., and three-year-old J.D. J.J.'s girlfriend, Cecilia V., was also at the residence that evening.

Defendant was asleep on the living room floor and J.D. was playing a video game. Eventually, D.D. told J.D. that it was

bedtime and started to put away the game. J.D. began crying and defendant awoke. An argument about the game ensued between defendant and D.D.

Defendant pushed D.D. onto the large couch and started choking him with both hands. J.J. ran toward the couch and punched defendant twice in the face to stop him from choking D.D. Defendant fell to the ground, letting go of D.D. When defendant stood back up, D.D. grabbed him by the waist and pushed him toward a small sofa. J.J. pinned defendant and D.D. on the sofa.

During the fight, Cecilia V. woke Lisa B. up and advised her that the males were "tussling." The women ran downstairs and found J.J. holding D.D. and defendant in a "bear hug" on the small couch. Lisa B. told J.J. to "let them up" and assured him, "I'm down here, shouldn't be a problem. Let him up." J.J. released D.D. and defendant.

Lisa B. told defendant to leave the house. Instead, he ran to the kitchen stating words to the effect, "I'm going to show you how we do this." He grabbed a knife from the knife block and ran toward J.J., repeating, "I'm going to show you how we do this." Seeing defendant approaching J.J., Lisa B. tried to push defendant away but he shoved her backward onto the couch.

Before Lisa B. could stand back up, defendant stabbed J.J. in the back. He fell against the television and onto the ground. J.J. exclaimed, "Mom, mom, he stabbed me," and Lisa B. saw blood "just gushing out." Lisa B. asked defendant why he

"did that," and he told her to "[s]hut up." Cecilia V. telephoned the police.

After stabbing J.J., defendant turned to go after D.D. D.D. picked up a glass and threw it at defendant. The glass shattered on the kitchen floor near defendant's feet. Defendant told D.D., "I'm going to kill your little ass next." Lisa B. told D.D. to run, and he fled out the front door. Defendant tried to chase D.D. but he slipped on the carpet.

Defendant ran out the front door to chase D.D. with J.J. and Lisa B. following. J.J. heard defendant yell at D.D., "I'm going to catch you, I'm going to catch you." D.D. responded, "You can't catch me, you're too fat, you're too slow." D.D. estimated that defendant chased him for seven to 10 minutes and reentered the house two or three times. Defendant brought out a different, two-pronged knife from the house during the chase. At one point, D.D. told defendant, "You're lucky my dad wasn't here." Defendant responded, "I would have stabbed his ass too." The children's father was serving in Iraq at the time of the incident.

Lisa B. saw defendant go into the house on two occasions and noticed that a knife was in his hand each time he came back out. She heard him threaten D.D. approximately three times, "I'm going to get you. When I get you, when I catch you I'm going to hurt you." Defendant had not caught D.D. by the time the police arrived.

Defendant previously told D.D. that he had stabbed someone in a fight over cigarettes. Lisa B. warned D.D. daily not to

talk back to defendant because he might hit or hurt D.D. when she was not present.

D.D. was afraid of defendant at the time of the incident. He believed that defendant was trying to stab him and would have done so if he had caught him. J.J. also believed that defendant would have stabbed D.D. if he had caught him. Defendant's fingerprints were found on the knife used to stab J.J.

A neighbor witnessed part of the incident and generally corroborated the participants' descriptions of events.

The defense rested without presenting any evidence or testimony. In summation, defense counsel theorized with respect to count three that defendant had threatened only to "get" D.D., not to kill him. Counsel argued that, if D.D. was armed with a knife, defendant may have been chasing D.D. for his own protection. On count four, counsel argued that the family members had exaggerated the story and that Lisa B. never was hit or battered or pushed down.

DISCUSSION

I

Witness Tampering

Defendant contends the trial court erred prejudicially by allowing the prosecutor to "educate" D.D. as to the responses that the prosecutor wanted to receive to certain of his questions. There was no error.

During motions in limine, the prosecutor asked to introduce evidence that (1) during the attack, defendant repeatedly

threatened, "Now I'm going to show you how it's done in the pen, and I'm going to kill you" or "This is how we do it in the pen," and (2) defendant previously had told D.D. about his having stabbed somebody in the "pen."

Defense counsel responded that the references to "the pen" were more prejudicial than probative under Evidence Code section 352. The trial court ruled that the words "in the pen" were relevant but must be excluded as more prejudicial than probative. The court further ruled that evidence that defendant had previously stabbed someone during an argument was admissible, but that any reference to prison or "the pen" must be excluded.

The following day, D.D. appeared in court accompanied by appointed counsel. D.D. was then in custody on an unrelated robbery adjudication. The court admonished D.D. not to mention the fact that defendant had spent time in prison. Regarding the current incident, the court told D.D. not to use the words "in the pen." Regarding the prior prison stabbing, the court admonished D.D. not to mention the incarceration. D.D.'s counsel requested time to discuss the admonition with D.D., and the court agreed.

Defense counsel then raised a new concern, which was that defendant had told D.D. he had "shanked" someone in a fight over cigarettes. The court remarked that it did not "see any problem over discussing that it was a knifing over cigarettes." However, the word "shank" is "very prison-specific," so the words "knife" or "stabbing" should be substituted.

D.D.'s counsel spoke with him again and explained the court's ruling. Counsel then asked the court to admonish D.D. as well. The court admonished D.D., and he said he understood the court's ruling and did not have any questions.

Immediately before he testified, D.D. reiterated that he understood the admonishment and did not have any questions.

D.D. testified that, after Lisa B. told J.J. to let D.D. and defendant go, J.J. released the duo and "[i]t's quiet. It got like quiet." This exchange ensued:

"Q [BY THE PROSECUTOR]: What happens next?

"A Then he says--then he goes and gets a knife.

"Q Okay. Do you remember if he said anything to you?

"A He said, 'Oh, okay.'

"Q Did he say anything else?

"A No."

"[¶] . . . [¶]

"Q After [defendant] has the knife, do you hear him say anything?

"A Naugh-uh.

Prior to this testimony, other witnesses had established that, when defendant ran to the kitchen, he repeatedly stated words to the effect, "I'm going to show you how we do this."

After briefly eliciting testimony from D.D. concerning defendant's stabbing of J.J., the prosecutor asked to approach the court. Following a sidebar conference, the trial court excused the jurors from the courtroom.

The following ensued:

"THE COURT: All right. The jury's left the courtroom, the doors are closed. [¶] [Counsel for D.D.], the People expressed a concern at sidebar that perhaps witness [*sic*] may have over interpreted my admonishment such that that any of the things said to him by his uncle, he's concerned about testifying to. [¶] My admonishment was very specific. It was any reference to incarceration. Anything else is fair game.

"[COUNSEL FOR D.D.]: That's my understanding as well. I've talked to [D.D.]. And I told him that he's free to talk about anything except incarceration. [¶] I believe we even discussed cigarettes, and the Court said it was all right. If he had knowledge that the defendant had stabbed somebody regarding some cigarettes, that wasn't even out of line. [¶] It's just the word 'shank' and any reference to the defendant's prior incarceration. And it's my understanding that [D.D.] understands that.

"THE COURT: All right. Well, I wanted to make sure because, uh, again, if that's what he remembers, that's what he remembers. [¶] Apparently the People had perhaps expected, after reviewing discovery that, uh, perhaps the witness didn't have [*sic*] a memory of his uncle saying some things to him during the time that this episode was taking place. [¶] If he indeed has that memory, he's free to testify about it with the specific admonition that I put into play. [¶] I'm not going to tell him what to say and I myself haven't reviewed the discovery. But if you wanted to confer briefly with the People and with the defense and then with your client, and just make

sure everybody's clear, I'm comfortable with that. [¶] I'm just not suggesting the witness is certainly not doing anything, if you will, wrong and I put that in quotes. There's no problem. [¶] But to the extent just making sure, since apparently there has been some unexpected responses, just making sure that the admonishment wasn't overly broad.

"[COUNSEL FOR D.D.]: My suggestion, and I don't want to be out of line, but perhaps --

"THE COURT: Please go ahead.

"[COUNSEL FOR D.D.]: --perhaps he could impeach this witness and say isn't it true that you said or do you remember saying--show him the police report, allow him to refresh his recollection, and do it the typical way.

"THE COURT: That certainly is a good suggestion. I was, of course, not going to make it myself, but there certainly ways [*sic*] to address any perceived inconsistency or issue with the testimony. [¶] I think that what I wanted to make sure was just that nothing about my add [*sic*] admonishment had been interpreted as too broad, and that it wasn't me that was keeping this witness from testifying to those things. [¶] If you're confident that it's not, we'll just proceed as before. [¶] And [prosecutor, defense counsel], you both can use any typical courtroom techniques at their [*sic*] disposal, and that's fine with me. [¶] Anybody have any different suggestions?

"[THE PROSECUTOR]: I absolutely do. I don't think that the issue of impeachment is actually on point, to be honest. [¶] The witness was admonished not to make reference to a

specific part of the language that he has given in statements as hearing. [¶] And my worry is that he's understanding, well, it's such an important part of that statement that he's not saying any of the statement because --

"THE COURT: Well, [counsel for D.D.] is saying he doesn't feel that's the case based on his conversation with his client.

"[COUNSEL FOR D.D.]: I can ask him with the Court's permission.

"THE COURT: Why don't you have a private conference about that in a minute, and we'll make sure everybody's on the same page.

"[COUNSEL FOR D.D.]: Okay just real briefly.

"[¶] . . . [¶]

"THE COURT: [Counsel for D.D.], have you had a chance to talk with your client?

"[COUNSEL FOR D.D.]: Yes, your Honor.

"THE COURT: Okay. Anything else you want to add? Or again, what I am trying to do is make sure that I wasn't overly stifling.

"[COUNSEL FOR D.D.]: I don't think so. I think it's just been a lapse in memory. And I--

"THE COURT: And if that occurs, then ordinary course is certainly tried and true techniques exist, and I will let these people proceed."

When the jury returned, the prosecutor resumed his examination from where he had left off and never returned to the incident with the knife in the kitchen. D.D. testified that

after J.J. was stabbed, D.D. threw a glass on the floor. D.D. told defendant to leave J.J. alone. Defendant said, "I'm going to kill your little ass next" and started chasing D.D. D.D. testified that defendant had told him a story about him having stabbed someone over some cigarettes. D.D. testified that he believed the story, "since he stabbed my brother, yeah." D.D. further testified that he had been afraid of defendant "throwing the knife" and D.D. "getting stabbed" at the time defendant was chasing him.

On cross-examination, defense counsel elicited D.D.'s testimony that defendant had said, "Okay, okay, I'm going to show you how we do this." The statement was cumulative of the testimony of other family members.

Defendant contends the prosecutor's approach to the bench "set in motion the process of educating his witness as to the responses [the prosecutor] expected from him." He reasons that the trial court, by allowing the extended line of questions in the presence of D.D., violated its duty under section 1044 to "assure defendant a fair trial in the process of controlling trial proceedings."

Defendant did not raise any objection to the court's procedure at trial. Any concerns about D.D.'s presence in the courtroom could have been addressed had a timely objection been made. Contrary to defendant's contention, the lengthy discussion presented ample opportunity for defense counsel to have entered a timely objection. Accordingly, defendant has forfeited any claim of judicial misconduct. (*People v. Harris*

(2005) 37 Cal.4th 310, 350; *People v. Samuels* (2005) 36 Cal.4th 96, 114.)

In any event, there was no error. Defendant claims the trial court, well aware of all the repeated admonishments that D.D. had received from it and from his counsel, erred by "reopening the issue based on so flimsy a purported need" as the prosecutor's mere receipt of unexpected answers. We disagree.

The trial court has statutory and inherent power to exercise reasonable control over all proceedings connected with the trial. (Code Civ. Proc., § 128; *People v. McKenzie* (1983) 34 Cal.3d 616, 626, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) As relevant here, the court has authority to "'"take whatever steps [are] necessary to see that no conduct on the part of any person [obstructs] the administration of justice."'" (*McKenzie*, at pp. 626-627.) Here, the court understandably suspected that its own conduct in admonishing D.D., a 15-year-old youth, may have obstructed or hindered his performance on the stand. D.D. appeared to have responded to the court's admonitions to omit any references to prison or the "pen" by testifying that defendant had made no statement at all. The court was not required to attribute this omission to D.D.'s faulty memory. The repeated admonitions would have made little sense to one who had no present recollection of defendant having made any statement. D.D.'s assurances that he understood the admonition justified the court's suspicion that he was applying it more broadly than had been intended. This is so even though, following discussion

with his client, D.D.'s counsel ultimately attributed the omissions to "a lapse in memory."

Defendant claims the trial court's procedure allowed the prosecutor to remind D.D. of the answers he was expecting. He claims the procedure was "particularly egregious" because D.D. "was permitted to remain in the courtroom during the entire exchange" and, subsequently, D.D. "gave 'expected responses.'"

The record refutes this contention. The only "expected" answers that the prosecutor had failed to receive involved defendant's statement in the kitchen regarding the knife. In an evident abundance of caution, the prosecutor never elicited this statement when proceedings before the jury resumed. Thus, the prosecutor never took advantage of any reminder that D.D. may have received regarding this statement.

Rather, the prosecutor elicited testimony that defendant chased D.D. and said, "I'm going to kill your little ass next." The prosecutor also elicited testimony that defendant had told D.D. a story about him having stabbed someone over some cigarettes, and that D.D. believed the story, "since he stabbed my brother, yeah." The prosecutor further elicited D.D.'s testimony that he was afraid of defendant "throwing the knife" and D.D. "getting stabbed" at the time defendant was chasing him. This testimony was sufficient to show D.D.'s receipt of a criminal threat and the resulting fear.

There is no indication that D.D.'s recollection had been faulty on any of these points. Nor is there any indication that the brief mention of cigarettes during the disputed proceedings

affected the content of D.D.'s testimony. Defendant's claim that his criminal threats conviction was based on questionable testimony, in violation of his Fourteenth Amendment fair trial rights, has no merit.

II

Self Defense Instructions

Defendant contends the trial court erred prejudicially by failing to instruct the jury sua sponte on self-defense in relation to count three (criminal threats). We are not persuaded.

The jury was instructed pursuant to CALCRIM No. 3470 on self-defense as it related to the crimes of assault with a deadly weapon, simple assault, and battery. The instruction was not made applicable to the count of criminal threats.

"In the absence of a request for a particular instruction, a trial court's obligation to instruct on a particular defense arises '"only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense *and the defense is not inconsistent with the defendant's theory of the case*."' [Citations.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148, quoting *People v. Barton* (1995) 12 Cal.4th 186, 195, italics added.)

In this case, defense counsel theorized: "Now, according to find [defendant] guilty of count 3, you're going to have to believe that [D.D.] was telling the truth about the whole story. And, once again, someone who has been recently convicted of a felony, someone whose testimony came across as less than

believable on the stand, I submit to you that [*D.D.*] *was probably puffing the story and you shouldn't believe it* and that *[defendant] is not guilty of criminal threats*. Instead, like Lisa [B.] testified, [defendant] said, 'I'm going to get you,' and she said that--she clarified that in cross-examination she heard him say, 'I'm going to get you,' when he was chasing him. [¶] And [D.D.] said, 'You can't get me. I'm too fast. You're too fat. You're too slow,' and that was the exchange that had happened, not a threat to kill." (Italics added.)

An instruction that defendant threatened to kill D.D. but did so in self-defense is patently inconsistent with the defense theory that D.D. merely puffed the story and the jury should not believe it. A defense instruction for self-defense posits that a threat *to* kill (or cause great bodily injury) actually occurred. The defense theory was that it did not occur; rather, defendant threatened to "get" D.D. but not to kill him or cause great bodily injury.

Defendant replies that "self-defense was not inconsistent with [his] theory that [D.D.] had not taken his threats seriously." Regardless whether that is so, self-defense was patently inconsistent with the defense theory that the threat was something less than a threat to kill. Moreover, it did not appear that defendant was relying on the inconsistent defense. Thus, the trial court had no sua sponte duty to extend the self-defense instruction to the count of criminal threats. (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1148.)

We note that counts one and two were dismissed following jury deadlock. Defendant's claim that the jury had "found" him "not guilty of chasing after [D.D.] wielding a knife, presumably on the theory of self-defense, upon which the defense relied," has no merit.

III

Ineffective Assistance of Counsel

Perhaps anticipating our conclusion in part II, *ante*, defendant contends his trial counsel's failure to request a self-defense instruction for the count of criminal threats constitutes ineffective assistance. The contention has no merit, either.

"'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418.)

Defendant does not contend that his trial counsel was ineffective for having relied on the theory of defense set forth in part II, *ante*. More specifically, defendant does not claim

counsel rendered deficient performance by contending that D.D. puffed his testimony and no criminal threat was uttered. Because counsel's choice of theory is unchallenged, there is no room for a contention that his representation was objectively unreasonable in that he failed to request a jury instruction that was inconsistent with his theory. (*People v. Avena, supra,* 13 Cal.4th at p. 418.) There was no ineffective assistance.

IV

Romero

Defendant contends the trial court denied his *Romero* motion under a mistaken belief that his prior record was more egregious than it actually was. Specifically, he argues the court mistakenly believed that his 1983 burglary convictions had been burglary in the first rather than the second degree. He claims he is entitled to a new *Romero* hearing where the court could consider his less egregious prior record. The point has no merit.

"On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

"Every burglary of an inhabited dwelling house . . . is burglary of the first degree." (§ 460, subd. (a).)

The amended complaint filed June 10, 1983, alleged in count one that, on May 5, 1983, defendant "did willfully, unlawfully, and feloniously enter an occupied residence . . . , in the nighttime, with the intent to commit larceny." The complaint alleged in count five that, on May 30, 1983, defendant "did willfully, unlawfully, and feloniously enter an occupied residence . . . , in the nighttime, with the intent to commit larceny."

The record contains both an "ORDER OF PROBATION Formal" and a "REPORT-INDETERMINATE SENTENCE, OTHER SENTENCE CHOICE" for proceedings on August 19, 1983. A discrepancy between the forms gives rise to defendant's claim of evidentiary insufficiency.

The order of probation recites that on August 19, 1983, defendant "entered his plea of Guilty to the charge of violation of Section 459 of the Penal Code, as charged in Counts One and Five of the Complaint." Because the pleas were entered "as charged," the trial court could deduce that they had not been reduced to lesser charges at the time of the plea. The court could further deduce that the convictions were for burglary of two inhabited dwellings, which are serious felonies under sections 460, subdivision (a), and 1192.7, subdivision (c)(18).

The probation order and the report of other sentence choice both reflect that imposition of judgment and sentence was suspended and defendant was placed on probation on conditions including a period of incarceration. However, unlike the probation order, the report describes each count as "Burglary, 2nd."

In August 1984, defendant admitted an allegation that he violated his probation. At sentencing in September 1984, defendant was "denied probation" and "committed to the State Prison . . . for the violation of section 459 of the Penal Code, *first degree*, as charged in Count One for the low term of two (2) years." It was further ordered that "defendant be committed to the State Prison . . . for violation of section 459 of the Penal Code, *first degree*, as charged in Count Five, for the low term of two (2) years. Eight (8) months is stayed upon the completion of sixteen (16) months, which is one-third of the mid term." (Italics added.)

The sentences specified on this order are consistent with convictions of first degree burglary, which is punishable by imprisonment for two, four, or six years. (§ 461, subd. (a).) Conversely, second degree burglary is punishable by imprisonment in the county jail not exceeding one year or in state prison for 16 months, or two or three years. (§§ 18, 461, subd. (b).)

The abstract of judgment for the 1984 proceeding lists both offenses as "Burglary, 1st."

At sentencing in the present case, the trial court stated: "I do accept the People's explanation. . . . [I]t does appear that the first original abstract [1983 report], which does not even include a sentence such that I could see, is an incomplete abstract that perhaps was even prepared in error or at least contains some typos. Every other indication, as the People have documented in their papers, as well as expressed orally, is of a conviction of first-degree burglary. It was clearly a dwelling

[*sic*], and the sentence also reflects a sentence for first degree burglary. Frankly, I don't know how you get to that sentence even by a plea negotiation, so I do find that those are first degree burglaries . . . ."

Because the 1983 report reflected a grant of probation, the trial court's conclusion that the report was "incomplete" for having failed to "include a sentence" finds no support in the record. However, the foregoing evidence adequately supports the trial court's deduction that the notations of "Burglary, 2nd Degree" were erroneous. (*People v. Delgado, supra,* 43 Cal.4th at p. 1067.) Defendant's reliance on *People v. Rodriguez* (1998) 17 Cal.4th 253, in which the People offered only an abstract of judgment that proved only the least adjudicated elements of the offense, even though proof of further facts was required, is misplaced. (*Id.* at p. 262.)

Defendant claims the trial court was not entitled to consider the 1984 abstract in determining the degree of the burglary convictions. Citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355, and *People v. Lewis* (1996) 44 Cal.App.4th 845, 851, defendant claims "[d]ocuments prepared after conviction and sentencing are not part of the 'record of conviction' and hence cannot be used as proof that the prior conviction was for a serious felony."

However, as *Lewis* notes, "a trier of fact is entitled to 'consider the *entire* record of the [criminal] proceedings *leading to imposition of judgment on the prior conviction* . . . .' [Citation.]" (*Lewis, supra*, 44 Cal.App.4th at

p. 851.) In this case, "imposition of judgment on the prior conviction" occurred in 1984, having previously been suspended in 1983. (*Ibid.*) Thus, the 1984 abstract of judgment is part of the "record of the [criminal] proceedings" that led to the imposition of judgment and sentence that year. *Lewis* allows, and does not preclude, consideration of the 1984 abstract of judgment. (*Lewis,* at p. 851.)

Because there was sufficient evidence that defendant's 1983 burglaries were serious felonies, the trial court's ruling on defendant's *Romero* motion need not be set aside. The court was entitled to consider the fact that defendant had committed serious felonies on two prior occasions, i.e., in 1983 and 1987, rather than on just one occasion. There was no error.

V

Section 4019

Finally, we note that the recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.